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Codifying *Caperton v. A.T. Massey Coal Co.*

Ronald D. Rotunda*

I. INTRODUCTION

As the Court has long acknowledged, due process leaves “matters of kinship, personal bias, state policy, [and] remoteness of interest,” to “legislative discretion,” not constitutional law.¹ A host of statutes, rules of court, professional codes, and regulations create various grounds that require judicial disqualification.²

Nonetheless, while due process limitations are few, they do exist. Before *Caperton v. A.T. Massey Coal Co.*,³ due process mandated judicial disqualification in two basic situations:⁴ first, when the judge had a direct, personal, and substantial pecuniary interest in the case, or second, when the judge acted as judge, jury, prosecutor, and complaining witness, and there was no need for an instant response.⁵ *Caperton* adds a third category.

The facts of the *Caperton* case and its holding are deceptively simple to summarize, at least initially. As the majority pithily explains, there was a dispute between the two companies.⁶ The trial court entered a jury verdict of \$50 million against Massey, and the West Virginia Supreme Court of Appeals reversed (3 to 2).⁷ The U.S. Supreme Court’s majority opinion claimed that Chief Justice Benjamin (who was in the majority of the West Virginia Supreme Court), “had received campaign contributions in *an extraordinary amount* from, and through the efforts of, the board chairman and principal officer of the corporation [Don Blankenship] found liable for the damages.”⁸ That, said the U.S. Supreme Court, meant that Benjamin’s refusal to recuse himself violated due process.⁹

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1. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (citing *Wheeling v. Black*, 25 W. Va. 266, 270 (1884)).

2. *E.g.*, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (“Of course, most questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.” (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986))).

3. 129 S. Ct. 2252, 2266 (2009). For further analysis, see Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).

4. 129 S. Ct. at 2267.

5. *See id.*

6. *See id.*

7. *Caperton v. A.T. Massey Coal Co., Inc.*, 679 S.E.2d 223 (W. Va. 2008).

8. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. at 2256-57 (emphasis added). The PAC (political action committee) of A.T. Massey Coal Company also contributed \$1,000 to Benjamin’s campaign. Massey Coal Company itself gave no money to either candidate. *Id.*

9. *Id.* at 2257 (“in all the circumstances of this case, due process requires recusal”).

This summary of *Caperton* is deceptive for two reasons. First, Justice Benjamin did not receive “extraordinary” *contributions*¹⁰ from Blankenship. Existing statutes already impose limits on campaign contributions,¹¹ and Blankenship complied with those statutes. Hence, there was nothing extraordinary about them. In *Caperton*, the Court later conceded that Blankenship only contributed the statutory maximum of \$1,000 to Benjamin’s campaign.¹² If the problem was the excessive contribution, existing statutes already took care of that.

The second reason this summary is deceptive is because the problem the majority identifies is not Blankenship’s *contribution*—his \$1,000 donation was insignificant—but Blankenship’s *independent expenditures*, which were sizeable.¹³ The expenditures are “independent” because, as discussed below, the individual who makes them does not coordinate these amounts with the candidate. Indeed, the candidate has no control over what the individual says, how he says it, how much he spends, when he spends it, or where he spends it.¹⁴

Hence, *Caperton* creates this third constitutional category that requires judicial recusal: sometimes, a judge must disqualify himself because an individual—who is not a lawyer or party before the Court but who has an interest in a case that is before the court—made *independent* campaign *expenditures* that may have benefited the sitting judge in securing his election.¹⁵ The question is: when does “sometimes” occur? And, what exactly was Blankenship’s interest in the case? We know that he is not a party, but the Court does not pursue the line of inquiry except to say that Blankenship was interested in the case.¹⁶

10. *Id.* at 2256 (“The basis for the motion was that the justice had received campaign contributions in an extraordinary amount . . .”).

11. *See, e.g.*, Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247, 258 (2010) (discussing the limit in West Virginia).

12. 129 S. Ct. at 2257.

13. “Independent expenditures” are amounts that an individual spends to attack or embrace a candidate for judicial office.

14. Blankenship spent a large amount of money in connection with this election but only made a \$1,000 contribution to Benjamin’s campaign:

Other than a \$1,000 direct contribution from Blankenship, *Justice Benjamin and his campaign had no control over how this money was spent*. Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads. *See Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam) (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive”); *see also* Brief for Conference of Chief Justices as Amicus Curiae 27, n. 50 (citing examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign).

Caperton, 129 S.Ct. at 2273 (Roberts, C.J., dissenting) (emphasis in original).

15. 129 S. Ct. at 2263-64.

16. *E.g.*, Brief of Petitioners, 2008 WL 5433361, *3 (“Mr. Blankenship’s extraordinary efforts on behalf of Justice Benjamin’s campaign - undertaken when Mr. Blankenship was preparing to appeal a judgment of great personal and professional significance [to him]”); *id.* at *17 (Blankenship “has a strong personal and professional interest in the outcome of this case - which created a compelling reason for Justice Benjamin to

The answer to these questions is not nearly as neat or as simple as one might think. The majority described the facts and holding of *Caperton* as follows:

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice *had received campaign contributions in an extraordinary amount* from, and through the efforts of, the board chairman and *principal officer* of the corporation found liable for the damages.¹⁷

The news media replicated the majority's summary of the case. For example, a *New York Times* editorial rhapsodized:

Indeed, the only truly alarming thing about [the *Caperton*] decision was that it was not unanimous. The case drew an unusual array of friend-of-court briefs from across the political spectrum, and such an extreme case about an ethical matter that should transcend ideology should have united all nine justices.¹⁸

The editorial further notes, "Chief Justice Roberts is fond of likening a judge's role to that of a baseball umpire" and "[i]t is hard to imagine that professional baseball or its fans would trust the fairness of an umpire who accepted \$3 million from one of the teams."¹⁹ Given this description of the case, the result should be obvious. Yet, four justices dissented.²⁰ The dissenters appeared to reject the common sense notion that there is judicial bias when—"without . . . the consent [of the other parties]—*a man chooses the judge in his own cause.*"²¹ After all, the umpire should not accept \$3 million from one of the teams before calling strikes and fouls.

The dissenters, however, did not argue that one party to a controversy should choose the judge to decide the dispute. They dissented because they did not believe the majority when it said the "justice *had received campaign contributions.*"²² Indeed, even the majority ends up conceding that the board

repay his debt of gratitude to Mr. Blankenship by casting the deciding vote in Massey's favor."); 129 S.Ct. at 2262 (Caperton argues that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected"); 129 S.Ct. at 2270-71 (Roberts, C.J. dissenting) (repeatedly referring to the "interest" to the individual making the expenditures).

17. *Id.* at 2256-57 (emphasis added).

18. Editorial, *Honest Justice*, N.Y. TIMES, June 9, 2009, at A22.

19. *Id.*

20. *Id.*

21. 129 S.Ct. at 2265-2267 (Roberts, C. J., dissenting) (emphasis added).

22. *Id.* at 2256-57 (emphasis added).

chairman (Don Blankenship) did not give any large contribution to Justice Benjamin. Instead, Blankenship spent a lot of his money attacking the incumbent, Chief Justice Warren McGraw. Mr. Blankenship had no personal financial interest in the case, or at least no interest (even if one would pierce the corporate veil) that was anywhere near the \$3 million he spent to attack Justice McGraw.²³

A. Contributions versus Expenditures

Blankenship's "independent expenditures" paid for a steady stream of advertisements that attacked Justice McGraw, but no party argued that Blankenship in any way coordinated with Benjamin's campaign. These expenditures were truly independent. Blankenship spent "over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements"—attacking McGraw. He was the prime funder (almost \$2.5 million of Blankenship's money) behind an independent entity called *And For The Sake Of The Kids* (ASK) (a political organization dedicated to opposing McGraw).²⁴ Blankenship focused like a laser beam on attacking McGraw,²⁵ and because there were only two candidates in the race, Benjamin was the one who benefited.

The dissenters believed, with justification, that the Court must treat independent expenditures differently than contributions. This distinction between "contributions" (giving money to, or spending money that is coordinated with,

23. *Id.* at 2273-74 (Roberts, J., dissenting).

24. *Id.* at 2257. As the news reported at the time, "And For The Sake Of The Kids," was dedicated to opposing McGraw:

The group has been running ads assailing McGraw's vote in a 3-2 court edict that reinstated probation for convicted child rapist Tony Dean Arbaugh. While on probation, Arbaugh, once charged with assaulting 11 children, some as young as 4, violated conditions and even pleaded guilty to smuggling marijuana into a regional jail. McGraw's campaign manager, A.V. Gallagher, pointed out the donation by Blankenship alone is six times the amount the incumbent justice has received for the general election. . . . "Warren McGraw says he's for the 'working man,' but he's not," Blankenship said in a statement. "He's for trial lawyers and he's for himself. His brother (Attorney General) Darrell McGraw buys what is clearly campaign material with thousands of dollars of public money."

Mannix Porterfield, *For the Sake of Kids Gets \$2.5 Million, Mostly Massey Cash*, THE REGISTER-HERALD, Oct. 15, 2004, available at http://www.wvcag.org/news/fair_use/2004/10_15.htm (on file with the *McGeorge Law Review*).

Commentators have also complained that "And For The Sake of the Kids," was a front to oust incumbent Supreme Court Justice Warren McGraw by linking him to his "ruling regarding a child molester released from prison." Diane Mufson, *Blankenship, Massey Could Have Funded New School*, THE HERALD-DISPATCH, May 12, 2010, available at <http://www.herald-dispatch.com/opinions/x540217122/Diane-Mufson-Blankenship-Massey-could-have-funded-new-school> (on file with the *McGeorge Law Review*).

25. Blankenship has even commented that his real purpose was to defeat McGraw. *See, e.g.*, Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 14, 2009, available at http://www.nytimes.com/2009/02/15/washington/15scotus.html?_r=1&ref=washington (on file with the *McGeorge Law Review*).

the candidate) and “expenditures” (spending one’s own money to advocate what one feels like advocating) is hardly technical. It is of constitutional dimension.²⁶

The Court has long protected independent expenditures—those not coordinated with the candidate—as free speech.²⁷ “Money talks.”²⁸ In contrast, the state has much greater leeway in regulating and limiting contributions.²⁹ “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”³⁰ Blankenship was exercising his core First Amendment speech when he paid for the attack-advertisements against Justice McGraw, the sitting justice whom Benjamin defeated.

As recently as 2010, in *Citizens United v. Federal Election Commission*, Justice Kennedy—the same Justice Kennedy who authored *Caperton*—emphasized the importance of independent expenditures.³¹ *Citizens United* held that a federal statute prohibiting a corporation’s independent expenditures for electioneering communications violated the First Amendment.³² Blankenship was exercising a core constitutional right when he criticized McGraw and urged voters to reject the incumbent. Thus, the Court in *Caperton* holds that due process clause required Benjamin to disqualify himself because Blankenship was exercising his First Amendment rights under *Citizens United*.³³

The state could not ban Blankenship’s independent expenditures anymore than it could ban any political activist from purchasing a megaphone so that the crowd can hear his message more clearly.³⁴ Activists who have more money—e.g., Ross Perot—can buy expensive television commercials to propagate their views. Those of us who do not have deep pockets—e.g., pockets not as deep as those of Mayor Bloomberg of New York³⁵—may not use the government to

26. 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.51 (4th ed. 2008).

27. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 24-25 (1976). “Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.” *Id.* at 47; see also Ronald D. Rotunda, *Judicial Elections, Campaign Financing, and Free Speech*, 2 ELECTION L. J. 79 (2003).

28. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part). MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 114-46 (2001).

29. *Buckley*, 424 U.S. at 262 (White, J., concurring in part and dissenting in part).

30. *Id.* at 48 (footnote omitted).

31. 130 S. Ct. 876, 898 (2010).

32. *Id.* at 886.

33. Even the ABA has noticed the interplay between *Citizens United* and *Caperton*. MODEL CODE OF JUDICIAL CONDUCT intro, p. 2 (Discussion Draft 2010). See Appendix A.

34. 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.51(b)(i), (b)(iii), (b)(v), (c)(ii), (d)(viii) (4th ed. 2008).

35. Michael Bloomberg’s campaign treasury totaled more than \$85 million, which was a “national record for a personally financed campaign.” Henry Goldman, Bloomberg Wins Third NYC Mayor Term, Beats Comptroller Thompson, Nov. 4, 2009, http://www.bloomberg.com/apps/news?pid=20601103&sid=a0sKkIZ1Dr_w (on file with the *McGeorge Law Review*).

silence the millionaire because our resources are less.³⁶ The idea that “government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”³⁷

Not only was Blankenship exercising core free speech when he made his independent expenditures, but there was little that either Justice McGraw, or his challenger, Brent Benjamin, could do about it. Justice Benjamin could not control Blankenship’s independent expenditure because Blankenship made those decisions independent of Benjamin. Benjamin could not limit or affect what Blankenship was saying, even if he disagreed with the style and tone of the Blankenship message. Of course, there was nothing that McGraw could do to control Blankenship either. The only thing that Justice Benjamin could control was the \$1,000 that Blankenship gave to Benjamin’s campaign.³⁸

Neither A.T. Massey Coal Company (nor any of its subsidiaries) contributed any money to Benjamin’s campaign, nor made any independent expenditure of funds that either supported Benjamin or criticized his opponent. Nor did Massey or any of its subsidiaries provide any money to support the nonprofit entity ASK,³⁹ the organization that Blankenship funded from his personal funds. ASK also published attack-advertisements against McGraw, and Benjamin’s campaign had no control over that either, even if the message of those advertisements did not fit the message that Benjamin was seeking to distribute. “Campaigns go to great lengths to develop precise messages and strategies. An insensitive or ham-handed ad campaign by an independent third party might distort the campaign’s message or cause a backlash against the candidate, even though the candidate was not responsible for the ads.”⁴⁰

In his opinion, Justice Kennedy never explains why the Court blurred the distinction between contributions and expenditures. All we know is that Kennedy acknowledges (and he only does so once) that Blankenship engaged in “independent expenditures.”⁴¹ But then, a dozen times he repeatedly re-labels these “independent expenditures” as “contributions.”⁴² Justice Kennedy discusses

36. See *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008) (invalidating a federal statute that eased the spending restrictions for non-self-financed candidates if he or she spent in excess of \$350,000 of his or her own money).

37. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

38. Joint Appendix, Vol. I at 208a, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213 (showing Benjamin for Supreme Court Committee, State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year).

39. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) (ASK was established under 26 U.S.C. § 527(e)).

40. *Id.* at 2273 (Roberts, C. J., dissenting).

41. *Id.* at 2257.

42. See *id.* at 2256-57 (“[T]he justice had received *campaign contributions* in an extraordinary amount from, and through the efforts of, the board chairman . . .”) (emphasis added); *id.* at 2257 (“Blankenship’s \$3 million in *contributions* . . .”) (emphasis added); *id.* at 2263 (“Not every *campaign contribution* by a litigant or attorney creates a probability of bias that requires a judge’s recusal . . .”) (emphasis added); *id.* at 2264 (“The inquiry centers on the *contribution’s* relative size in comparison to the total amount of money contributed to the

the precedent in disqualification cases, and quotes the relevant portions of those cases as referring to “contributions” to the judge,⁴³ not independent expenditures. Yet, he treats the two concepts, “contributions to the Judge Benjamin’s campaign” and “independent expenditures attacking McGraw,” as synonymous, without explaining why. Nor does he ever suggest that, in the future, the Court will treat independent expenditures the same as contributions. Indeed, a year after *Caperton*, the Court in *Citizens United*, in an opinion that Kennedy authored, reemphasized the distinction between contributions and expenditures.⁴⁴

Blankenship’s independent expenditures against McGraw were hardly unusual for him. Blankenship is an activist, daresay an eccentric, who has often made independent expenditures to support his favored causes in West Virginia elections on issues entirely unrelated to Massey. “For example, Blankenship spent millions of dollars of his own money to unseat candidates who opposed abolishing the state sales tax on food.”⁴⁵ He also spent millions of dollars to defeat a bond referendum.⁴⁶

II. THE FINANCIAL INTERESTS OF BLANKENSHIP AND HIS ROLE IN THE JUDICIAL CAMPAIGN

Caperton does not reject the earlier (and later) distinction between contributions and expenditures.⁴⁷ Instead, it says that this case has something more—a combination of factors that require disqualification. The Court considered “all the circumstances of this case” and concluded that “due process

campaign, the total amount spent in the election, and the apparent effect such *contribution* had on the outcome of the election.”) (emphasis added); *id.* (“Blankenship *contributed* some \$3 million to unseat the incumbent and replace him with Benjamin. His *contributions* eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin’s campaign committee.”) (emphasis added); *id.* (“Whether Blankenship’s campaign *contributions* were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.”) (emphasis added); *id.* (“Blankenship’s *campaign contributions*—in comparison to the total amount *contributed* to the campaign . . .”) (emphasis added); *id.* (“The temporal relationship between the *campaign contributions*, the justice’s election, and the pendency of the case is also critical.”) (emphasis added); *id.* (“when the *campaign contributions* were made”) (emphasis added); *id.* at 2265 (“Although there is no allegation of a quid pro quo agreement, the fact remains that Blankenship’s extraordinary *contributions* were made . . .”) (emphasis removed) (second emphasis added); *id.* at 2266 (“[S]ome states require recusal based on *campaign contributions* . . .”); *see also id.* at 2265 (“The parties point to no other instance involving judicial *campaign contributions* that presents a potential for bias comparable to the circumstances in this case.”) This last comment is intriguing. Of course the parties point to no other case—there is no precedent because Justice Kennedy created the rule for the first time in this case. One could just as well say, there is no precedent supporting *Caperton*’s position. That is a fact of life, not a reason why petitioner should win.

43. *Id.* at 2260 (citing *Ward v. Village of Monroe*, 409 U.S. 57, 60 (1972)).

44. 130 S.Ct. 876 (2010).

45. Brief for Respondents at 6, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165.

46. *Id.*

47. 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 20.51(b) (4th ed. 2008).

requires recusal” because the “probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”⁴⁸

Justice Kennedy thought *Caperton* was an “extreme” case, and under it disqualification would be limited to “rare instances.”⁴⁹ This case is “extreme by any measure.”⁵⁰ This is “an exceptional case.”⁵¹ This is “an extraordinary situation” that “requires recusal.”⁵² No other instance “would present a potential for bias comparable to the circumstances in is case.”⁵³ One must apparently look at “all the circumstances of this case.”⁵⁴ Let us look at these circumstances.

Justice Kennedy said it was significant that Blankenship had a “personal stake” in this particular case.⁵⁵ This is an important factor for the Court, but Kennedy does not explain why it is true. He simply accepted—without discussion—the proposition that this case meant a lot to Blankenship because of Blankenship’s financial stake in the outcome.⁵⁶ It is true that Blankenship was a principle officer of Massey (he was the Chairman, CEO, and President),⁵⁷ however his ownership/financial interest was minor.⁵⁸ Blankenship is a wealthy man, but he was not anywhere near becoming a controlling stockholder in Massey. In fact, he owned only 0.35% of Massey’s stock.⁵⁹

If we were to pierce the corporate veil and pretend that the proportional share of *Caperton*’s damage claim against Massey would come directly out of Blankenship’s personal wallet, Blankenship’s share of the judgment in this case—assuming that Massey was liable—would be only \$175,000.⁶⁰ If Blankenship really thought he could buy a judge, he was not getting much value for his money. It makes little economic sense for Blankenship to spend \$3

48. 129 S.Ct. at 2257 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). However, *Withrow* only said that the probability of actual bias on the part of judge or a decision-maker is too high to be constitutionally tolerable if the decision-maker has a pecuniary interest in the outcome of the case, or if he or she has been the target of personal abuse or criticism from the party before him or her. *Id.* Those factors were not part of *Caperton*.

49. See *Caperton*, 129 S. Ct. at 2265-67.

50. *Id.* at 2265.

51. *Id.* at 2263.

52. *Id.* at 2265.

53. *Id.*

54. *Id.* at 2257.

55. *Id.* at 2263-64

56. *Id.* at 2265.

57. *Id.*

58. *Id.* at 2257.

59. Brief for Respondents, at 5, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165.

60. See *id.* Compare MASSEY ENERGY CO., QUARTERLY REPORT (FORM 10-Q) (Nov. 7, 2008), available at <http://secfilings.com/searchresultswide.aspx?TabIndex=2&FilingID=235842&type=convpdf&companyid=11418&ppu=%2fdefault.aspx%3fticker%3d%26amp%3bname%3dmassey%2benergy%26amp%3bformgroupid%3d2%26amp%3bauth%3d1> (on file with the *McGeorge Law Review*) (85.1 million shares outstanding), with STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP (FORM 4) (Nov. 18, 2008) (296,935 shares owned by Blankenship).

million of his own money for a chance to save \$175,000. Perhaps Mr. Blankenship was emotionally tied to this case—an emotion divorced from rationality—but that was not Justice Kennedy’s point. Kennedy simply asserts that Blankenship was financially tied to this case.⁶¹ He did not explain Blankenship’s interest, and as the above equation illustrates, the cold calculus of finances does not explain Blankenship’s interest either.

Prior to *Caperton*, Justice Benjamin decided other cases involving Massey Coal. Notably, none of the parties to those cases asked for Benjamin to recuse himself. Hence he participated in those decisions and often ruled against Massey.⁶² Even after *Caperton* was decided, Justice Benjamin ruled against Massey in other cases. For example, shortly after the West Virginia Supreme Court decided *Caperton*, Justice Benjamin voted to deny review in another case, leaving a \$243 million verdict standing *against* Massey.⁶³ The \$50 million verdict against Massey in *Caperton* was a very large amount to be sure, but it paled in comparison to the \$243 million that Justice Benjamin approved in the other case, where no one raised a disqualification motion.

One might argue that Justice Benjamin did not cast the deciding vote in the other case, but that he did in *Caperton*. However, the validity of any disqualification motion cannot turn on whether the judge will cast the deciding vote *after* oral argument and *after* the judges’ deliberation. Parties have to make their disqualification motion *before* the judges decide. The law does not allow litigants to see how things work out before they file their motion, because the disqualified judge is not even supposed to participate in the deliberations. As Justice Blackmun explained in *Aetna Life Insurance Co. v. Lavoie*, a case involving the disqualification of another judge:

[T]he constitutional violation in this case should not depend on the Court’s apparent belief that Justice Embry cast the deciding vote—a factual assumption that may be incorrect and, to my mind, should be irrelevant to the Court’s analysis. For me, Justice Embry’s mere participation in the shared enterprise of appellate decisionmaking—whether or not he ultimately wrote, or even joined, the Alabama Supreme Court’s opinion—posed an unacceptable danger of subtly distorting the decisionmaking process.⁶⁴

61. See *Caperton*, 129 S. Ct. at 2265 (“the fact remains that Blankenship’s *extraordinary contributions* were made at a time when he had a *vested stake* in the outcome”) (emphasis added).

62. See *U.S. Steel Mining Co. v. Helton*, 631 S.E.2d 559 (W. Va. 2005); *Helton v. Reed*, 638 S.E.2d 160 (W. Va. 2006) (where Justice Benjamin voted against Massey companies at the merits stage); see also *McNeely v. Independence Coal Co.*, No. 042156 (W. Va. Feb. 9, 2005); *Brown v. Rawl Sales & Processing Co.*, No. 06-1700, (W. Va. Sept. 7, 2007) (where he ruled against Massey at the petition stage).

63. Brief for Respondents, at 9, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 216165.

64. 475 U.S. 813, 831 (1986) (Blackmun, J., concurring).

In *Caperton*, Justice Kennedy also said it was important that Blankenship “had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”⁶⁵ We know that Blankenship had no influence in directing the judge’s election campaign. Presumably, Kennedy meant that Blankenship’s independent expenditures were crucial, or at least important, in securing Justice Benjamin’s election.

Justice Kennedy stressed that the judicial election was “decided by fewer than 50,000 votes.”⁶⁶ Granted, 50,000 votes is a narrow victory in a well-populated state like California, but it is not so in West Virginia. Justice Benjamin beat McGraw by 53.3% to 46.7%.⁶⁷ Thus, he won the election by 6.6 percentage points! That is not a close election. Consider, for example, that in the 2008 election, President Obama enjoyed what many commentators called a landslide.⁶⁸ Yet only 52.87% of the voters picked Obama.⁶⁹

Chief Justice Roberts, in his dissent, disputed Justice Kennedy’s assumption that Blankenship’s expenditures were all that important to Justice Benjamin. “Many observers believed that Justice Benjamin’s opponent doomed his candidacy by giving a well-publicized speech that made several curious allegations; this speech was described in the local media as ‘deeply disturbing’ and worse.”⁷⁰

Roberts was much too kind. He does not mention the substance of the speech, but one can easily find discussions in the West Virginia newspapers. McGraw gave his strange stump speech on Labor Day of 2004, shortly before the November election. Unfortunately for him, someone tape recorded it. McGraw said, for example, his opponents “tell you that members of my party have opposed school prayer. False! Not so! It’s the Republican Party!” He also proclaimed “*not more than six months ago, the United States Supreme Court approved gay marriage! Not Democrats!*”⁷¹ The speech became known as “The

65. 129 S.Ct. at 2263-64.

66. *Id.* at 2264.

67. *Id.* at 2274 (Roberts, C.J., dissenting).

68. See Andrew Keen, *Obama’s Landslide Will Throw Up Conservative Bloggers*, The INDEPENDENT, Nov. 10, 2008, at 54, available at <http://www.independent.co.uk/news/media/online/andrew-keen-obamar-squos-landslide-will-throw-up-conservative-bloggers-1005317.html> (on file with the *McGeorge Law Review*); Shaun Mullen, *The Barack Obama Landslide and Leading America Out of the Wilderness*, MODERATE VOICE, Nov. 5, 2008, available at <http://themoderatevoice.com/24085/the-barack-obama-landslide-leading-america-out-of-the-wilderness> (on file with the *McGeorge Law Review*).

69. Dave Leip’s Atlas of U.S. Presidential Elections, 2008 Presidential General Election Results, <http://uselectionatlas.org/RESULTS/index.html> (last visited Oct. 21, 2010) (on file with the *McGeorge Law Review*).

70. *Caperton*, 129 S.Ct. at 2274 (Roberts, C.J., dissenting).

71. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 302 n.35 (W. Va. 2008) (Benjamin, C.J., concurring) (emphasis added). To hear it yourself, visit: http://www.youtube.com/watch?v=TQ_6nQaE2FM8 (last visited Dec. 31, 2009).

Scream at Racine.” As the GOP rebroadcasted it repeatedly,⁷² Justice McGraw’s own words undercut him.

III. CONCLUSION: CREATING A RULE TO IMPLEMENT THE DISQUALIFICATION TEST OF CAPERTON

As we analyze *Caperton* carefully, we learn that it is difficult to divine or discern a test to determine when due process requires disqualification in a case that is similar to, but not exactly like, *Caperton*. We know the Court will disqualify a judge on constitutional grounds if five members decide that the facts are “extreme.” And in making the determination, as an “*objective* matter,” that a person who was not a party (but was interested in a case) should not “*choo[se] the judge in his own cause*,”⁷³ the five members will not distinguish between campaign expenditures and independent campaign contributions. What else the Court will consider, however, is something left to future cases. Granted, not all legal tests have the nice precision of a diamond jeweler’s scale.⁷⁴ Still, the Supreme Court should be able to offer judges a better test than “it all depends” in deciding whether the judge must recuse himself as a matter of constitutional law.

What we do know is that, as a matter of due process, excessive *contributions* or excessive *independent expenditures* may require judges to recuse themselves when a party (or a party’s lawyer) objects. This was the case in *Caperton*, even though Mr. Blankenship had a free speech right to spend—even squander—his own money in the form of independent expenditures.

Caperton also does not say that the decision on the merits must come out differently. The Supreme Court merely remanded the case to the West Virginia Supreme Court of Appeals.⁷⁵ Justice Benjamin recused himself, and another West Virginia judge sat in his place by special designation. The West Virginia Court, once again, overturned (4 to 1) the \$50 million judgment against Massey Coal.⁷⁶ So, after all of the litigation, the case ended up exactly where it was before the U.S. Supreme Court reviewed it.

Inevitably, lawyers in the future will want to know when they should move to disqualify under *Caperton*, and judges will want to know when they should grant such a motion. Unfortunately, Justice Kennedy’s majority opinion is short on specifics.

72. Scott Finn, *Caperton v. Massey: What a Long, Strange Case it's Been*, W. VA. PUB. BROADCASTING, June 9, 2009, available at <http://www.wvpubcast.org/newsarticle.aspx?id=9955> (on file with the McGeorge Law Review).

73. *Caperton*, 129 S. Ct. at 2265-66 (emphasis added).

74. See Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1342-43 (2006).

75. *Caperton*, 129 S.Ct. at 2267.

76. *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009).

Although he purported to talk of objective and reasonable perception, the opinion offered no objective test:

We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.⁷⁷

Justice Kennedy acknowledged that “sometimes no administrable standard may be available” to determine when the judge should disqualify herself.⁷⁸ He also repeatedly emphasized that this case was unusual, “extreme by any measure,”⁷⁹ “exceptional,”⁸⁰ and “an extraordinary situation”⁸¹ requiring recusal. No other instance, he suggested, would “present a potential for bias comparable to the circumstances in this case.”⁸² So the majority suggests that the case will not lead to a flurry of recusal motions. But whether this prediction is true will depend on how lower courts interpret it.

We should try to create a rule that codifies *Caperton*, so judges have fair warning of when they must recuse themselves. This effort is likely to be fruitless. Expensive judicial campaigns are troublesome, and *Caperton* is one effort of the Court to limit what many people see as the corrosive effects of judicial campaign financing.⁸³ Yet, it is hard to create a bright-line rule that requires a judge to recuse himself when independent expenditures (which the judge has no control over) become excessive.

In *Caperton*, Justice Kennedy concluded that under all the circumstances, Blankenship’s “pivotal role in getting Justice Benjamin elected” meant that Justice Benjamin would “feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”⁸⁴ This “debt of gratitude” test is no more

77. *Caperton*, 129 S.Ct. at 2263-64.

78. *Id.* at 2265.

79. *Id.*

80. *Id.* at 2263.

81. *Id.* at 2265.

82. *Id.*

83. See James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 295 (2010) (“The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today.”).

84. 129 S.Ct. at 2262.

refined than a rule that says the judge must disqualify herself when the case is “extreme by any measure.”⁸⁵ As Blankenship told one interviewer:

“I’ve been around West Virginia long enough to know that politicians don’t stay bought, particularly ones that are going to be in office for 12 years,” he said, referring to the terms of State Supreme Court justices. “So I would never go out and spend money to try to gain favor with a politician. Eliminating a bad politician makes sense. Electing somebody hoping he’s going to be in your favor doesn’t make any sense at all.”⁸⁶

West Virginia Supreme Court terms are twelve years. Why would Justice Benjamin tilt this one case to favor Blankenship after his election, when everyone knows (1) there will not be another election for a dozen years, (2) no one knows now whether Benjamin would run for reelection, (3) Benjamin, if he decided to run again, may not need the support of Blankenship in the next election, and (4) neither Benjamin nor Blankenship may even be alive in twelve years? Blankenship’s reaction is exemplified by Henry Adams’ epigram, “a friend in power is a friend lost.”⁸⁷

Caperton, like any vague decision, raises many questions, and this “debt of gratitude” rationale is a doozy. If, as Justice Kennedy argues, independent expenditures create a “debt of gratitude”⁸⁸ in the judge who benefits from the expenditures, what if there is a debt of ingratitude? For example, if Justice Benjamin had lost and his opponent had won, must that opponent recuse himself because the opponent would feel animosity or ingratitude against Blankenship?

Commentators typically think of *Caperton* as affecting judicial campaign financing, and so it may. But as the discussion of “debt of gratitude” shows, gratitude does not have to be limited to campaign contributions or independent expenditures. The *Caperton* Court may well learn, over the coming years, that the rather vague test in that case will leak into the appointed judiciary.

The test of gratitude may well invite or even require a great number of judicial disqualifications of Article III judges. President Richard Nixon appointed Chief Justice Burger, Justice Blackmun, and Justice Powell—all of whom did not hesitate to rule against him in *United States v. Nixon*.⁸⁹ Justice Breyer and Justice Ginsburg participated in *Clinton v. Jones*, although Clinton had appointed both of

85. *Id.* at 2265.

86. See, e.g., Adam Liptak, *Case May Alter Judge Elections Across Country*, N.Y. TIMES, Feb. 14, 2009, available at http://www.nytimes.com/2009/02/15/washington/15scotus.html?_r=1&ref=washington.

87. Henry Adams, *THE EDUCATION OF HENRY ADAMS* 94 (1999).

88. *Caperton*, 129 S. Ct. at 2262.

89. 418 U.S. 683 (1974). Nixon also appointed Justice Rehnquist, who disqualified himself for a different reason (his friendship with Attorney General Mitchell). Later, Rehnquist joined the majority in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982). Along with Powell who wrote the majority opinion, Burger concurred. Blackman, yet another Nixon appointee, dissented. Nixon appointed Burger, Blackmun, Powell, & Rehnquist. 6 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE*, 471 476, 477 (4th ed. 2008).

them.⁹⁰ Both ruled against Clinton, with Justice Ginsburg joining the majority and Justice Breyer concurring in the judgment. If they had a disqualifying “debt of gratitude,” they surely did not show it. Yet, after *Caperton*, should these justices have rethought their participation? Future litigants may seek to disqualify federal judges because of a possible debt of gratitude to a senator or mentor, who was important in securing their appointment, or to the President who appointed them.

The present ABA Model Code of Judicial Conduct has no disqualification rule dealing with a “debt of gratitude.” It does, however, have Model Rule 2.11(A)(4), which deals with *contributions* to judicial campaigns⁹¹ but not with *independent expenditures* (i.e., amounts that an individual spends to attack or embrace a candidate for judicial office). So, Rule 2.11(A)(4) would not have affected the disqualification in *Caperton* even if West Virginia had adopted the ABA Rule. In fact, it has been a full decade since the ABA proposed Model Rule 2.11(A)(4), and since that time not a single state has adopted it.⁹² It is, however, a bright-line rule that is easily understood and enforced.

The relevant ABA Committee has tried its hand in developing language to codify the *Caperton* rule but has found it difficult. One tentative proposal offers this language for a new Rule 2.11(A)(4):

The judge knows or learns by means of disclosures mandated by law or a timely motion that contributions to the judge’s campaign [or to the campaign of an opponent whom the judge defeated in the election,] in an amount that [is greater than \$ [insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity] have been made by donors associated or affiliated with a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule.⁹³

The purpose of this section is to strengthen the existing ABA Model Judicial Code, Rule 2.11(A)(4). However, the reluctance of states to adopt the existing version of Rule 2.11(A)(4) does not augur well for the prospects of a stronger version. Moreover, this proposed new version does not deal with the problem of *Caperton*, because one version does not cover independent expenditures, and no version offers an objective test.

If this proposed rule were extended to independent *expenditures*—if Justice Benjamin had lost the election and the other candidate, the incumbent, Justice Warren McGraw, had won—this new rule would guarantee that Blankenship could disqualify McGraw. That would have the perverse result of increasing the

90. *Clinton v. Jones*, 520 U.S. 681 (1997).

91. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4); *see also id.* at R.4.4(A)(2), Comment 3.

92. Appendix A at 16. Alabama has a provision governing campaign contributions that predated ABA Model Rule 2.11(A)(4). ALA. CODE §§ 12-24-1, 12-24-2 (2006). Mississippi also has a provision, although it is not a codification of the ABA Model Rule. MISS. CODE OF JUDICIAL CONDUCT canon 3E(2) (2008).

93. *See* Appendix A at 7.

incentives of activists to spend money in judicial campaigns. These activists, even if they were unsuccessful in seating their favorite candidate, would be successful in disqualifying the candidate who won. It is a win-win situation for well-heeled litigants who want to disqualify a particular judge—just contribute to his opponent, and whoever wins must disqualify himself (one, because of a debt of gratitude and the other because of a debt of ingratitude).

The ABA has alternative versions of the Model Judicial Rule that do refer to “independent expenditures.”⁹⁴ However, like *Caperton* itself, the ABA offers no rule; it simply offers issues the judge should consider—“a non-exclusive list of factors to be considered by the judge in determining whether disqualification is appropriate in the campaign support context.”⁹⁵ The ABA actually argues that “a non-exclusive list of factors” the judge should consider in deciding whether to disqualify himself will actually be “helpful,”⁹⁶ but this list is not helpful because it is just a list, and a nonexclusive one to boot.

If the ABA decides to promote one of its versions that include restrictions on independent expenditures, as in *Caperton*, then the new rule would require disqualification even though the judge cannot control those expenditures. After all, these expenditures are, by hypothesis, “independent.” The proposed ABA rule has no provision allowing judges to disavow the views of the person or group engaged in independent expenditures.

The final answer may be that there is no way to codify *Caperton*. The Wisconsin Supreme Court, in response to *Caperton*, examined that case and decided not to codify it.⁹⁷ Indeed, Wisconsin did the opposite: it adopted a rule that explicitly provides that endorsements, campaign contributions, and independently run advertisements in themselves are *not* enough to force a judge’s recusal.⁹⁸

Every future Justice Benjamin would like a clear rule. To the extent that there is a bright-line test (or at least a test that approaches a bright line), judges will follow it. Litigants will know when to file their motions. Indeed, if the line is bright enough, judges can recuse themselves *sua sponte*.

In addition, the brighter line reduces the transaction costs for litigants and for judges. Judges can follow the rules without worry that a higher court, after weighing all the factors, will conclude, months or years later, that the judge was unethical in not recusing himself. Instead, the ABA offers “more nuanced variants” that will make it more difficult for judges to follow the rule because the rule is: “it all depends.”

94. Appendix A at 8, 10, 14, & 18.

95. Appendix A at 18.

96. Appendix A at 19.

97. Patrick Marley, *State High Court Says Campaign Donations Can’t Force Recusals*, MILWAUKEE J. SENTINEL, Oct. 28, 2009, available at <http://www.jsonline.com/news/statepolitics/67012672.html> (on file with the McGeorge Law Review).

98. *Id.*

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Granted, it is not easy to draft a litmus test to determine disqualification. In some cases, such a test may be unusually difficult. *Caperton* looks like it falls in that category. It is never easy to systematize the law. In the case of *Caperton*, it is simply impossible.

Appendix A: STANDING COMMITTEE ON JUDICIAL INDEPENDENCE WORKING GROUP ON JUDICIAL DISQUALIFICATION PROPOSED AMENDMENTS TO THE MODEL CODE OF JUDICIAL CONDUCT (ABA, Mar.10, 2010 Discussion Draft):

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FOR DISCUSSION PURPOSES ONLY**

**STANDING COMMITTEE ON JUDICIAL INDEPENDENCE
WORKING GROUP ON JUDICIAL DISQUALIFICATION**

PROPOSED AMENDMENTS TO THE MODEL CODE OF JUDICIAL CONDUCT

Introduction

Since 2007, the ABA Standing Committee on Judicial Independence (“SCJI”) has been working on a project to survey disqualification rules and practices around the country, particularly in the state courts, to identify problems and uncertainties that arise under existing regimes, and, where appropriate, to propose reforms. The Judicial Disqualification Project (“JDP”) conducted research and circulated in 2009 draft recommendations and report language primarily within the ABA but also to certain outside entities with a strong interest in the area (such as the Conference of Chief Justices). Certain concerns and reservations were expressed with respect to some aspects of the report language and some of the proposed recommendations. Relatively contemporaneously, two decisions of the U.S. Supreme Court, one on June 8, 2009 and the other on January 21, 2010, have intervened and have significantly altered the landscape of judicial disqualification in the context of judicial election campaign support.

In *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), the U.S. Supreme Court held, based on, limited by, and subject to its rather “extreme facts,” that refusal of a West Virginia high court judge to grant a motion to disqualify in the face of financial support for his campaign in excess of \$3 million from the CEO of a party created a “serious, objective risk of actual bias” that was constitutionally intolerable. *Id.* at 2265. The Court extolled the Model Code and the states’ adoption thereof as maintaining the integrity of the judiciary and the rule of law. *Id.* at 2266.^{*} Noting that “the due process clause demarks only the outer boundaries of judicial disqualifications,” *id.* at 2267, the Court observed that “States may choose to ‘adopt standards more rigorous than due process requires.’” *Id.*, quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring) and citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (distinguishing the “constitutional floor” from the ceiling set “by common law, statute, or the professional standards of the bench and bar”).

^{*} The Court quoted with approval the 1990 ABA Model Code’s objective standard enjoining judges to avoid impropriety and the appearance of impropriety. *Caperton*, 129 S. Ct. at 2266 (citing Brief for American Bar Association as *Amicus Curiae* 14 & n. 29). The Court also quoted with approval the brief amicus curiae of the Conference of Chief Justices, which underscored that the state codes of judicial conduct are “the principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.” *Caperton*, 129 S. Ct. at 2266 (quoting Brief for Conference of Chief Justices as *Amicus Curiae* 4, 11).

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Caperton thus strongly signals the importance, both to the states and to public perceptions of the judiciary in general, of having rules in state judicial codes that can contain the mischief of excessive campaign support in judicial elections. That importance has increased exponentially in the wake of the Court's even more recent decision in *Citizens United v. Fed. Election Comm'n*, 2010 WL 183856 (U.S. Sup. Ct., No. 08-205, Jan. 21, 2010). There the Court held that statutory limitations on independent campaign expenditures by corporations and labor unions violated the First Amendment. The case did not concern judicial elections; rather it involved restrictions on the dissemination and showing, during the presidential campaign primaries leading up to the November 2008 general election, of a documentary entitled "Hillary: The Movie." As a consequence of this decision, corporations and labor unions will be able to make unlimited expenditures not only in general elections but in judicial elections as well. The mere possibility that a vast influx of additional campaign money might enter the latter arena, which already in the past decade has been saturated with unprecedented campaign support, virulent attack ads, and concomitant diminution in public respect for state judiciaries, makes tighter controls over disqualification imperative in cases where parties have provided significant financial support.

In the wake of these developments, SCJI constituted a new Working Group to take a fresh look at the JDP and to propose new recommendations. As part of that effort, the Working Group has focused on Rule 2.11 of the MODEL CODE OF JUDICIAL CONDUCT (2007) (the "Model Code"). Having heard that the Standing Committee on Ethics and Professional Responsibility (SCEPR) is considering revisions to other parts of the Model Code, SCJI has reached out to SCEPR to suggest collaboration on possible revisions to the Model Code. While focusing primarily on the text and commentary to Rule 2.11, the Working Group noted possible improvements to other provisions in Canons 2 and 3 of the Model Code; these are offered here for SCEPR's consideration as well.

We are aware of the enormous amount of effort put forth by SCEPR and the ABA's Center for Professional Responsibility on the 2007 version of the Model Code. Nothing in this document should be regarded as in any way diminishing or depreciating the value and significance of that effort. The Working Group believes, however, that the landscape of campaign support in judicial elections (some form of which take place in 39 of the 50 states) has dramatically changed in the wake of the *Caperton* and *Citizens United* decisions. That transmogrification, especially when conjoined with the enormous additional influx of campaign support in judicial elections during the past decade, has considerably raised the stakes for state judiciaries in terms of judicial independence and public perception of the integrity, impartiality, fairness – and, indeed, the legitimacy – of the judicial branch of government. The ABA has traditionally taken the leading role in providing guidance to the states on matters of judicial ethics and judicial conduct, and it is in that spirit that the following proposed revisions to the Model Code are being offered.

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* * * *

What follows are the Working Group's suggested revisions to the Model Code. The format employed herein uses redlining and strikeout features to display the proposed changes to certain of the Rules in Canons 2 and 3 and, where applicable, the Comments accompanying the Rules. After each rule, additional explanatory text will summarize the rationale behind the proposed revisions.

We welcome all comments and suggestions on this draft. We request that any such comments and suggestions be submitted -- referring to particular page and line numbers to facilitate our consideration thereof -- in writing to the Working Group's Reporter, at the e-mail address furnished at the conclusion of this document, on or before April 2, 2010.

* * * *

Terminology

Amendments to Text

1 “Affiliate” and “affiliated” means any person, domestic or foreign, that controls, is
2 controlled by, or is under common control with any other person.

3 “Associate” and “associated” means any person who employs, is employed by, or is
4 under common employment with another person; any person who acts in cooperation,
5 consultation, or concert with, or at the request of, another person; and any spouse, domestic
6 partner, or person within the third degree of relationship of any of the foregoing.

7 “Control” and “controlled” each refers to the power of one person to exercise, directly
8 or indirectly or through one or more persons, a dominating, governing, or controlling influence
9 over another person, whether by contractual relationship (including without limitation a debtor-
10 creditor relationship), by family relationship, by ownership, dominion over, or power to vote any
11 category or voting interest (including without limitation shares of common stock, shares of

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12 voting preferred stock, and partnership interests), or by exercising (or wielding the power to
13 exercise) in any manner dominion over a majority of directors, partners, trustees, or other
14 persons performing similar functions.

15 “Person” means any natural or juridical person, including without limitation any
16 corporation, limited liability company, partnership, trust, union or other labor organization; any
17 branch, division, department or local unit of any of the foregoing; any political committee, party,
18 or organization; or any other organization or group of persons.

Amendments to Commentary

Not applicable.

Explanation of Proposed Changes

Two new terms, “Affiliate”/“affiliated” and “Associate”/“associated,” are being proposed in order to give the broadest reach possible to the description in Rule 2.11 of those who provide campaign support in judicial elections. The purpose of these definitions is to prevent such supporters from avoiding or evading the potential judicial disqualification consequences of their support by resort to such simple expedients as the use of various types of business associates and affiliated persons to disguise or conceal the identity of the supporter or the purpose of the campaign support. Definitions of two additional, ancillary terms, “Control”/“controlled” and “Person,” were added in order to explicate and flesh out the content of the first two terms in a manner that would avoid making any of these definitions overly cumbersome.

Rule 2.10 Judicial Statements on Pending or Impending Cases

Amendments to Text

1 (A) A judge shall not make any public statement that might reasonably be expected to

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2 affect the outcome or impair the fairness of a ~~matter~~ pending* ~~matter~~* or impending* ~~matter~~* in
3 any court, or any nonpublic statement that might substantially interfere with a fair trial or
4 hearing.

5 (B) A judge shall not, in connection with cases, controversies, or issues that are likely
6 to come before the court, make pledges, promises, or commitments that are inconsistent with the
7 impartial* performance of the adjudicative duties of judicial office.

8 (C) A judge shall require court staff, court officials, and others subject to the judge's
9 direction and control to refrain from making statements that the judge would be prohibited from
10 making by paragraphs (A) or (B).

11 (D) Notwithstanding the restrictions in paragraph (A), a judge ~~may make public~~
12 ~~statements in the course of official duties~~, may explain court procedures, and may comment on
13 any proceeding in which the judge is a litigant in a personal capacity.

14 (E) Subject to the requirements of paragraph (A), a judge may respond directly or
15 through a third party to allegations in the media or elsewhere concerning the judge's conduct in a
16 matter.

Amendments to Commentary

None proposed.

Explanation of Proposed Changes

Minor language changes to Paragraph (A) are intended as a housekeeping amendment, to make the language track precisely, rather than paraphrase, the terms of art used in the Terminology section.

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The proposed amendment to paragraph (D) is substantive. As currently drafted, the “public statements” clause of paragraph (D) renders nugatory the clause in paragraph (A) against a judge making public statements that might reasonably be expected to affect the outcome of, or impair the fairness of, any pending matter or impending matter. The impartiality of a judge making any such public statement might reasonably be questioned within the meaning of Rule 2.11(A) or might create an appearance of impropriety sufficient, in either event, to require the judge’s disqualification from presiding (in the case of an impending matter) or presiding further (in the case of a pending matter) over the proceedings. Nothing in the commentary accompanying Rule 2.10 explains the otherwise inexplicable phenomenon of paragraph (A) giving with one hand and paragraph (D) taking away with the other. The Standing Committee on Judicial Independence believes the simplest approach is to delete the inexplicable phrase from paragraph (D) rather than try to come up with a way of qualifying or conditioning it.

Rule 2.11 Disqualification

Amendments to Text

- 1 (A) A judge shall disqualify himself or herself in any proceeding in which the judge’s
2 impartiality* might reasonably be questioned, including but not limited to the following
3 circumstances:
- 4 (1) The judge has a personal bias or prejudice concerning a party or a party’s
5 lawyer, or has personal knowledge* of facts that are in dispute in the
6 proceeding.
- 7 (2) The judge knows* that the judge, the judge’s spouse or domestic partner,*
8 or a person within the third degree of relationship* to either of them, or
9 the spouse or domestic partner of such a person, or a person in association
10 with whom the judge practiced law within the preceding three years [states
11 are free to vary this time period], is:

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- 12 (a) a party to the proceeding or an officer, director, general partner,
13 managing member, or trustee of a party;
14 (b) acting as a lawyer in the proceeding;
15 (c) a person who has more than a de minimis* interest that could be
16 substantially affected by the proceeding; or
17 (d) likely to be a material witness in the proceeding.
- 18 (3) The judge knows that he or she, individually or as a fiduciary,* or the
19 judge's spouse, domestic partner, parent, or child, or any other member of
20 the judge's family residing in the judge's household,* has an economic
21 interest* in the subject matter in controversy or is a party to the
22 proceeding.
- 23 (4) The judge knows or learns by means of disclosures mandated by law* or
24 a timely motion that a party, a party's lawyer, or the law firm of a party's
25 lawyer has within the previous [insert number] year[s] made aggregate*
26 contributions* to the judge's campaign[, or to the campaign of an
27 opponent whom the judge defeated in the election,] in an amount that [is
28 greater than \$ [insert amount] for an individual or \$[insert amount] for an
29 entity] [is reasonable and appropriate for an individual or an entity] have
30 been made by donors associated* or affiliated* with a party or counsel
31 appearing before the court, unless a waiver is agreed to by all other parties
32 in accordance with the provisions of this Rule.

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VARIANT 1: The judge knows or learns by means of disclosures mandated by law* or a timely motion that aggregate* contributions* to the judge's campaign[, or to the campaign of an opponent whom the judge defeated in the election,] in an amount greater than \$25,000 [individual states are free to vary this dollar amount] have been made by donors associated* or affiliated* with a party or counsel appearing before the court, unless a waiver is agreed to by all other parties in accordance with the provisions of this Rule. In determining whether disqualification (with or without motion) is appropriate under this paragraph, the factors to be considered should include, *inter alia*:

(a) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge's [or opponent's] campaign and to the total amount spent by all candidates for that judgeship;

(b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;

(c) The timing of the support in relation to the case for which disqualification is sought;

(d) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue

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54 before the court, (iii) the judicial candidate [or opponent], and (iv)
55 the total support received by the judicial candidate [or opponent]
56 and the total support received by all candidates for that judgeship.

57 **VARIANT 2:** The judge knows or learns by means of disclosures
58 mandated by law* or a timely motion that aggregate* contributions* to the
59 judge's campaign[, or to the campaign of an opponent whom the judge
60 defeated in the election,] in an amount greater than

61 Option 1: ___ percent [individual states are free to specify this
62 percentage] of all such contributions to the judge's [or opponent's]
63 campaign; or

64 Option 2: ___ percent [individual states are free to specify this
65 percentage] of all contributions to all candidates for that judicial
66 position during the campaign; or

67 Option 3: ___ percent [individual states are free to specify this
68 percentage] of all such contributions to the judge's [or opponent's]
69 campaign, and ____ percent [individual states are free to specify this
70 percentage] of all contributions to all candidates for that judicial
71 position during the campaign

72 have been made by donors associated* or affiliated* with a party or
73 counsel appearing before the court, unless a waiver is agreed to by all
74 other parties in accordance with the provisions of this Rule. In

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determining whether disqualification (with or without motion) is appropriate under this paragraph, the factors to be considered should include, *inter alia*:

- (a) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
 - (b) The timing of the support in relation to the case for which disqualification is sought;
 - (c) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, and (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.
- (5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (6) The judge:

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(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter;

(d) previously resided as a judge over the matter in another court.

(7) A motion to disqualify has been filed in which a party or a lawyer representing a party in the proceeding has brought to the judge's attention, and the judge does not contest, that the judge has, in connection with the proceeding or controversy, violated the requirements of the foregoing provisions of this paragraph or of Rule 2.3, 2.4, 2.6, 2.8(B), 2.9, or 2.10.

VARIANT: A motion to disqualify has been filed on behalf of a party to the proceeding by a lawyer who has submitted a sworn affidavit alleging that the judge has, in connection with the proceeding or controversy, violated the requirements of the foregoing provisions of this paragraph or of Rule 2.3, 2.4, 2.6, 2.8(B), 2.9, or 2.10.

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114 (B) A judge shall keep informed about the judge's personal and fiduciary economic
115 interests— and shall make a reasonable effort to keep informed about the personal economic
116 interests of the judge's spouse or domestic partner and ~~minor children~~ members of the judge's
117 family who reside ~~residing~~ in the judge's household.

118 (C) Any motion to disqualify the judge, or the appeal from the denial of such a
119 motion, shall be decided promptly after all papers relating to the motion, or briefs on appeal,
120 have been filed, or the time for filing such papers or briefs under applicable law* has elapsed,
121 whichever occurs first. Denials of disqualification motions, and decisions on appeals therefrom,
122 should be in writing or otherwise on the record and should set forth the reasons for the decision.

123 (D) A judge subject to disqualification under this Rule, other than for bias or prejudice
124 under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and
125 may ask the parties and their lawyers to consider, outside the presence of the judge and court
126 personnel, whether to waive disqualification. If, following the disclosure, the parties and
127 lawyers agree, without participation by the judge or court personnel, that the judge should not be
128 disqualified, the judge may participate in the proceeding. The agreement shall be incorporated
129 into the record of the proceeding.

Amendments to Commentary

1 [4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a
2 relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's
3 impartiality might reasonably be questioned under paragraph (A), or the relative is known by the
4 judge to have an interest in the law firm that could be substantially affected by the proceeding

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5 under paragraph (A)(2)(c), the judge's disqualification is required. Similarly, if the judge within
6 the preceding three years [states are free to vary this time frame] practiced law in association
7 with a person who is involved in the case in one of the capacities enumerated in paragraph 2(a)
8 through (d), the judge's disqualification is required; where such professional association took
9 place more than three years previously, disqualification is discretionary and should be analyzed
10 under the general standard of whether the judge's impartiality might reasonably be questioned.
11 The distinction between this provision and paragraph 6(a) is that the latter deals with the judge's
12 prior association with a lawyer in the case during the time of that association (*i.e.*, prior to the
13 judicial service), whereas this provision deals with a lawyer involved in the case not during the
14 prior association but within a relatively short period of time since the prior association with the
15 judge ended. Moreover, as the language of the rule makes clear, these black letter provisions are
16 not intended to be exclusive, and certain other relationships, such as a close and longstanding
17 personal friend of the judge or the spouse of such a friend, might fall within the appearance of
18 impartiality standard.

19
20 [5] A judge should disclose on the record information that the judge believes the parties
21 or their lawyers might reasonably consider relevant to a possible motion for disqualification,
22 even if the judge believes there is no basis for disqualification. To assist judges in fulfilling this
23 obligation, courts should promulgate rules requiring parties and their counsel to disclose
24 corporate and other business organization affiliations and, in those states in which judges face

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some kind of election, details of campaign contributions and independent expenditures made to support the election campaign of any judge before whom they are appearing [or the judge's opponent] by any party or counsel, or any of their affiliates or associates.

[7] Since paragraph (A)(4) was added to the Code in 1999, judicial elections have become significantly more contentious, and campaign support has increased exponentially. To avoid the appearance of partiality or unfairness, as well as due process problems of the sort identified by the U.S. Supreme Court in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), paragraph (A)(4) mandates disqualification, in states where judges face some form of election, when campaign support for the judge's election campaign [or for the election campaign of an opponent whom the judge defeated in the election], from donors associated or affiliated with a party or counsel appearing before the court, rises above a sum certain, the appropriate level of which would be determined separately by each jurisdiction. For judges to have adequate information in order to comply with this rule, appropriate disclosures from campaign supporters under state statute or under court rules are necessary. To prevent litigants from "gaming" the system by making contributions precisely in order to be able to disqualify particular judges, the amounts specified by each jurisdiction should be high enough to discourage such behavior, and the other parties to the proceeding will have the ability to waive disqualification in accordance with the provisions of this rule. In order to provide the States with a menu of choices when considering adoption of this Rule, two variants have also been proposed. Variant I uses a

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particular dollar amount as the trigger for disqualification, while Variant 2 uses a percentage as the trigger and offers three alternative options; each variant also enumerates a set of factors which are not exclusive but which should be considered in determining (whether or not the determination is prompted by motion) if disqualification is appropriate.

[8] In order not to enlarge unduly the length and cost of litigation, decisions on disqualification issues should be both meaningful and prompt. Each jurisdiction should have in place procedures for interlocutory review of a denial of a motion to disqualify. Denials of motions to disqualify, and decisions on appeals from such denials, should be rendered as quickly as possible after the motion or the appeal, as the case may be, is filed, and all such decisions should be in writing or otherwise on the record and contain an explanation of the reasons for the decision. Decisions voluntarily to disqualify or to grant a disqualification motion need not contain an explanation of the reasons therefor, but a judge may decide, in the exercise of discretion, to provide such an explanation.

Explanation of Proposed Changes

Rule 2.11(A)(2) would be amended by adding language to cover a lawyer involved in a case pending before the court with whom the judge had been professionally associated a short time before the judge had been elevated to the bench. The time period selected was three years, but there is no magic to that number, and it is contemplated that states could use this as a menu option where each jurisdiction would be free to specify the time frame it felt most appropriate with respect to the prior association. *Cf. Jewell Ridge Coal Corp. v. Local No. 6167*, 328 U.S. 161, 897 (1945) (separate opinion of Jackson, J., criticizing Justice Black for sitting on a case argued by his former law partner of 20 years before).^{**} This provision is being suggested in

^{**/} For a roughly contemporaneous, and sympathetic, discussion of Black's participation in the case by one of his former law clerks, *see generally* John P. Frank,

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order to fill a gap left by 2.11(A)(6)(a), which covers a lawyer with whom the judge practiced represented the party during the period when that lawyer and the judge were associated, but does not cover the situation where that same lawyer represents the party *now*, rather than then. The concern here is not so much that the judge might be privy to nonpublic information about the party (as might be perceived to be the case in the (6)(a) situation), rather that the judge might be perceived as being less than completely impartial toward a lawyer (and, by extension, that lawyer's client) with whom the judge was recently associated. The passage of time would allay such concerns, however. For that reason, three years is being suggested as the cutoff, though, as noted, each jurisdiction is free to specify a longer or shorter time frame. Explanatory language has also been added to Comment 4. The suggestion that similar situations might exist was added to the comment language rather than to the rule (the example chosen is a lawyer with whom the judge had no prior professional association but who is a close and longstanding friend or the spouse of such a friend).

* * *

Rule 2.11(A)(4) in its present form was added to the Model Code in 1999 to address concerns about threats to the appearance of fairness and impartiality posed by campaign finance in judicial elections. Today, over a decade later, not a single state has adopted this Rule, and only two states, Alabama and Mississippi, have adopted provisions to address this particular concern (Alabama's provision actually antedated Rule 2.11(A)(4)). ALA.CODE §§ 12-24-1, 12-24-2 (2006); MISS.CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008).

Preliminarily, neither the Working Group nor SCJI as a whole finds anything wrong with the approach of the existing rule. With respect to the text of the existing rule, however, the Working Group has offered some suggested revisions in order to clarify that disqualification may be just as necessary when the judge's (unsuccessful) opponent received substantial campaign support from a litigant or counsel now before the judge as when it was received by the judge's own campaign. At oral argument in the *Caperton* case, the latter was referred to by several of the Justices in questioning Massey's counsel about the concept of a "debt of gratitude." See e.g., Transcript of Oral Argument 38-39, 43-45, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), available at http://www.supremecourt.us/oral_argument/argument_transcripts/08-22.pdf (The former could then be, and in post-*Caperton* discussions has been, referred to as a "debt of hostility"). Conceptually due process would logically require disqualification for disproportionate campaign opposition just as with disproportionate campaign support. If that is so, it seems only sensible for the Model Code to provide for both.

Disqualification of Judges, 56 YALE L.J. 605 (1947). See also Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 S. CT. REV. 203, 208 (1988).

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There is an antecedent question concerning how a judge would know about campaign support for an opponent unless it had been in the form of virulent attack ads with attribution, e.g., “Paid for by the United Mine Workers” (to borrow the example used by Chief Justice Roberts during oral argument in *Caperton*) or state law were to require disclosures by supporters that were then made publicly available or, at a minimum, available to the candidates.^{***} In the wake of *Caperton* and *Citizens United*, judges will, at a minimum, need to have access to more information in order to be able to make appropriate campaign support disclosures in the cases over which they preside, and donors who are parties or are associated or affiliated with parties before the court (including counsel) must be required to make their own disclosures on the record. (This can be accomplished either by statutory provisions in state election laws or by rules of court, similar to existing court rules mandating disclosures of corporate affiliations, support for filing of briefs *amicus curiae*, etc.) Anticipating this, the Working Group has proposed inserting the phrase “disclosures mandated by law or” before “a timely motion” in the first clause of the Rule.

Moreover, the Working Group has proposed more expansive language that would replace the former formulation, “a party, a party’s lawyer, or the law firm of a party’s lawyer” with “donors associated or affiliated with a party or counsel appearing before the court.” The intention here is to foreclose efforts to evade the Rule by funneling different contributions through affiliated or associated donors. The proposed language make use of the proposed new defined terms (see above) and hopes to capture all campaign support made by entities within a corporate complex, including those from individual directors, officers, employees, consultants, and other agents (and family members of the foregoing), and to accomplish a similar objective as to counsel appearing in the case by capturing support from their law firms, subsidiaries or affiliates of their law firms, and individual attorneys associated with any of them (along with family members). Suggested language on this topic has also been added to Comment 5.

We have also suggested the elimination of language limiting the concept of disqualifying support to donations made within a specified number of years prior to the case coming before the judge. If the support was sufficiently substantial, the passage of time alone will not necessarily eliminate the taint of partiality or unfairness in public perception. (Recall also the Robert Jackson-Hugo Black feud). The Working Group believes that the ability of other parties to

^{***}/ In West Virginia, for example, Don Blankenship, the Chairman and CEO of Massey Coal, had to fill out a financial disclosure form on which it says “Expenditures made to Support or Oppose”; Blankenship underlined the word “Support” and typed in the words “Brent Benjamin.” Argument Transcript, *supra*, at 8; see also Joint App. 188a, *Caperton v. Massey*, 129 S. Ct. 2252 (2009) (No. 08-22), 2008 WL 5784213.

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waive disqualification in these circumstances is adequate protection against over-disqualification and avoids the arbitrariness of any chronological cut-off.

Though the existing Rule, particularly as revised, seems eminently reasonable, the Working Group and SCJI believe that the ABA must face up to the uncomfortable reality that no state has adopted it. Given that reality, two variants on Rule 2.11(A)(4) are being proposed to supplement, not to supplant, the existing version. The purpose of these variants is to provide each State in which judges at any level are subject to any form of election with a menu of options in crafting a rule suitable for its particular circumstances.

The proposed Variant 1 on Rule 2.11(A)(4) once again expressly contemplates disclosures of campaign support by parties and counsel in accordance with applicable “law,” which, as used in the Terminology section, comprehends both statutory law and rules of court. A judge who knows (or learns as a result of the aforementioned disclosures or a disqualification motion) that the judge’s campaign, or that of the judge’s opponent during the campaign, received more than a specified dollar amount of support from donors associated or affiliated with a party or counsel appearing before the court, must withdraw from the case, subject to the ability of the parties to waive disqualification. The variant offers \$25,000 as a suggested dollar amount on the theory that it is neither too low to attract “gaming” of the system by unscrupulous lawyers or litigants who wish to preserve the option to disqualify a judge they don’t like nor too high in terms of public perceptions of whether a judge has been “bought.”

Variant 1 also incorporates a non-exclusive list of factors to be considered by the judge in determining whether disqualification is appropriate in the campaign support context. These factors were adapted from the brief *amicus curiae* of the Conference of Chief Justices in the *Caperton* case, which were referred to from time to time at oral argument.^{****} They include:

- (a) The level of support given, directly or indirectly, by a litigant in relation both to aggregate support (direct and indirect) for the individual judge’s [or opponent’s] campaign and to the total amount spent by all candidates for that judgeship;
- (b) If the support is monetary, whether any distinction between direct contributions or independent expenditures bears on the disqualification question;
- (c) The timing of the support in relation to the case for which disqualification is sought;

^{****/}

See Argument Transcript, *supra*, at 24 (Alito, J.), 46 (Breyer, J.), 52 (Stevens, J.).

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(d) If the supporter is not a litigant, the relationship, if any, between the supporter and (i) any of the litigants, (ii) the issue before the court, (iii) the judicial candidate [or opponent], and (iv) the total support received by the judicial candidate [or opponent] and the total support received by all candidates for that judgeship.

Variant 2 adopts a similar approach but, instead of prescribing a dollar amount as the trigger for disqualification, substitutes a percentage. Three different options are offered for choosing a percentage: (1) a percentage of total support for the judge's campaign (or that of the judge's opponent); (2) a percentage of total support for all candidates for that judicial position; or (3) a combination of (1) and (2). Variant 2, like Variant 1, also incorporates a non-exclusive list of factors to be considered by the judge in determining whether disqualification is appropriate in the campaign support context.

Proposed language on the subject of this variant has been suggested for a new Comment 7 to Rule 2.11.

The Working Group believes that having these slightly more nuanced variants as alternatives to the simplicity of pre-existing Rule 2.11(A)(4) will be helpful to the States and will, as noted above, provide them with something of a menu from which to craft provisions suitable to their particular circumstances.

* * *

A new Rule 2.11(A)(7), proposed in two alternate versions, is intended to address what appears to be an inadvertent lacuna in the Model Code. Canon 2 is replete with provisions regulating judicial conduct, but nothing is said about the consequences of failing to abide by any of those provisions. As is well known, state judicial conduct commissions exist to address complaints brought against judges, including complaints containing allegations of violations of the Model Code. In addition, however, some (though not all) of the provisions in Canon 2 refer to circumstances in which disqualification would be appropriate. The provisions in question are expressly noted in both versions of the proposed rule: Rules 2.3, 2.4, 2.6, 2.8(B), 2.9, 2.10, and 2.11(A)(1)-(6).

Often, these sorts of violations are unintentional or inadvertent, and, in the press of court business, the judge may not even be aware that a possible violation has taken place. Proposed Rule 2.11(A)(7) provides that where a motion to disqualify brings this situation to the judge's attention, and the judge does not contest the factual allegations in the motion, then the judge should grant the motion withdraw from the case. What happens, however, if the judge does

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contest the factual predicate for the motion? A variant on this provision is being offered that would require the judge to accept as true any such factual allegations offered as a sworn affidavit of counsel accompanying the disqualification motion. In those circumstances, assuming the affidavit is legally sufficient and the motion is timely filed and otherwise meets such procedural requirements as are imposed on such motions under applicable law, then the judge must grant the motion. The Working Group believes the latter variant is the better approach, as it provides a much cleaner procedure. Such a procedure is already in use in several states^{*****} The risk of attorney abuse is small, since if the facts alleged in the affidavit are false, the judge, despite having had to disqualify himself or herself from the case in question, can still make a referral to bar disciplinary authorities.

* * *

Minor revisions have been proposed to Rule 2.11(B). The Working Group sees no reason why the judge's duty to make a reasonable effort to keep informed about the personal economic interests of others residing in his or her household should be limited to minor children but should be extended to any member of the judge's family who resides in the judge's household. (N.B. Under the language of the Rule, the judge's duty to be informed appears to apply to a spouse or domestic partner regardless of whether that person resides in the judge's household; we see no reason to alter that).

* * *

A new Rule 2.11(C) has been proposed. A foundational principle of the Working Group's approach to the JDP is that rulings on disqualification motions must be both meaningful and prompt. The proposed Rule addresses both. First, it requires a prompt decision on a disqualification motion and on an appeal from the denial of a disqualification motion. "Justice delayed is justice denied." This requirement is an appropriate addition to the Model Code inasmuch as it places an affirmative obligation upon judges to address an issue that is absolutely fundamental to both the appearance and reality of a judge's fairness and impartiality, the default proposition of Rule 2.11(A). Second, in the event a motion to disqualify has been denied, the

^{*****} See, e.g., COLO. REV. STAT. ANN. § 16-6-2; COLO. R. CIV. P. R.97; COLO. R. CRIM. P. R.21(b); D.C. SUPER. CT. R. 63-I; FLA. STAT. ANN. § 38.10; FLA. R. JUD. ADMIN. R.2.330; GA. SUPER. CT. R. 25.3; MONT. CODE ANN. § 3-1-805. See also Goebel v. Benton, 830 P.2d 995 (Colo.1992); Birt v. State, 350 S.E.2d 241, 242 (Ga.1986). Cf. N.C. GEN. STAT. ANN. § 15A-1223; State v. Poole, 289 S.E.2d 335, 343 (N.C.1982) (trial judge presented with disqualification motion should "either recuse himself or refer a recusal motion to another judge if there is 'sufficient force in the allegations contained in [the] motion to proceed to find facts.'") (quoting North Carolina Nat'l Bank v. Gillespie, 230 S.E.2d 375, 380 (N.C.1976)).

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proposed Rule requires that an explanation therefor be provided either in a written decision or otherwise on the record; the same requirement would apply to decisions on appeals from such denials. Such written explanations would not only enrich the law of judicial disqualification but, more importantly, would over time provide firmer guidance to judges who have to apply disqualification rules to novel factual settings.

Reluctance to provide such an explanation usually stems from the belief that judges might have to disclose on the record matters that are private or potentially embarrassing. We believe that in most instances this concern is unfounded. First, if a private or potentially embarrassing matter is the basis for the disqualification motion, it will already be set forth in the motion, which is a public document. Second, in such a situation, it would be prudent for the judge, who is in the best position to know about the private or potentially embarrassing facts, to have disqualified himself or herself voluntarily in the first instance, thereby obviating the need for the filing of a motion.

The requirement for an explanation only applies to disqualification motions that are denied. If the judge grants such a motion, or disqualifies himself or herself voluntarily, no explanation is necessary. In such instances, it properly remains within the discretion of the judge whether to provide an explanation in a written opinion or on the record, and we anticipate that judges would only do so where the explanation would be of future value to the judiciary and the bar. Proposed language summarizing these principles has been suggested as a new Comment 8.

With the addition of new Rule 2.11(C), former Rule 2.11(C) would be redesignated as Rule 2.11(D) but without any change to the language.

**Rule 3.2 Appearances before Governmental Bodies
and Consultation with Government Officials**

Amendment to Text

- 1 A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an
- 2 executive or a legislative body or official, except:

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3 (A) in connection with matters concerning the law, the legal system, or the administration
4 of justice, including a hearing to confirm, or assess the judge’s qualifications for, appointment to
5 another judicial office or governmental position;

6 (B) in connection with matters about which the judge acquired knowledge or expertise in
7 the course of the judge’s judicial duties; or

8 (C) when the judge is acting pro se in a matter involving the judge’s legal or economic
9 interests, or when the judge is acting in a fiduciary* capacity.

Amendments to Commentary

None proposed.

Explanation of Proposed Change

This proposed revision is intended to clarify that a judge’s appearance at a confirmation hearing or a hearing to assess the judge’s qualifications for appointment to another judicial office or governmental post is not prohibited.

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Rule 3.4 Appointment to Governmental Positions

Amendment to Text

- 1 A judge shall not accept appointment, simultaneous with service as a judge, to a governmental
2 committee, board, commission, or other governmental position, unless it is one that concerns the
3 law, the legal system, or the administration of justice.

Amendment to Commentary

None proposed.

Explanation of Proposed Change

This proposed revision makes the very commonsense clarification that the prohibition on accepting appointment to a governmental position applies only where service in the governmental position would be simultaneous with service as a judge. Nothing should prohibit a sitting judge from accepting a governmental position that will commence after the judge's resignation from the bench or after expiry of the judge's term.

Respectfully submitted,

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